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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-62

RUSSELL L. RUNYON, *et ux.*,

Petitioners,

v.

MICHAEL C. McCRARY, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, AMERICAN JEWISH COMMITTEE, AMERICAN JEWISH CONGRESS, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE AND AMERICAN CIVIL LIBERTIES UNION AS *AMICI CURIAE*

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

The undersigned, as counsel for the Anti-Defamation League of B'nai B'rith, American Jewish Committee, American Jewish Congress, the National Association for the Advancement of Colored People and the American Civil Liberties Union respectfully move this Court for leave to file the accompanying brief *Amici Curiae* in support of the position of Respondents requesting that this Court affirm the decision below that the discriminatory practices of defendants and intervenors herein are prohibited under 42 U.S.C. §1981.

Consent to file the attached brief has been sought from the parties, and all have granted such permission except

Russell L. Runyon, *et ux.*, and Fairfax-Brewster School, Inc. It is therefore necessary to request permission of this Court under Rule 42.

B'nai B'rith, founded in 1843, is the oldest civic service organization of American Jews. The Anti-Defamation League was organized in 1913 as a section of B'nai B'rith to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States.

The American Jewish Committee was founded in 1906, and likewise has among its major purposes that of advancing good will and broader understanding among all Americans.

The American Jewish Congress is a national organization of American Jews founded in 1918 and concerned with the preservation of the security and constitutional rights of American Jews through preservation of the rights of all Americans.

The National Association for the Advancement of Colored People is the largest national civil rights organization in this country. As such, it is vitally concerned with fundamental human rights and particularly with the constitutional rights of Black Americans.

The American Civil Liberties Union was founded in 1920 and is a national civil rights organization interested in the preservation of the civil liberties of all persons.

The *Amici* are among the leading civil rights and human relations agencies in the United States. Each of these or-

ganizations has filed numerous briefs *Amici* in this and other courts in the interest of securing the constitutional and statutory civil rights of all Americans. Each is national in scope and is able to address the issues raised on this appeal in the broad context of the unified national purpose to eradicate the scourge of racial discrimination. Each respectfully offers this Court its accumulated experience of the issues raised by this case.

The *Amici* seek to submit the accompanying brief because they believe this case presents to this Court a serious challenge to the attainment of meaningful school desegregation, a goal which cannot be fully achieved so long as private schools are permitted to reject students solely on the basis of race.

Respectfully submitted,

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Opinions Below

The opinions of the Fourth Circuit Court of Appeals sitting *en banc* together with the opinion on rehearing are reprinted at 515 F.2d 1082. The opinion of the United States District Court for the Eastern District of Virginia, Alexandria Division (Bryan, J.), is reported at 363 F. Supp. 1200.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Whether §1981 of Title 42 of the United States Code, derived from the Civil Rights Act of 1866, prohibits schools which receive no government financial aid from denying admission to qualified Black applicants solely on the basis of their race.

2. Whether the application of §1981 to schools which receive no government financial aid is limited by the Constitutional demands of the First Amendment.

Interest of the *Amici*

B'nai B'rith, founded in 1843, is the oldest civic service organization of American Jews. The Anti-Defamation League was organized in 1913 as a section of B'nai B'rith to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States.

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The *Amici* submit this brief because they believe the instant case presents to this Court a serious challenge to the attainment of meaningful school desegregation, a goal which cannot be fully achieved so long as private schools are permitted to reject students solely on the basis of race.

Statement of the Case

Fairfax-Brewster School is located in Fairfax County, Virginia, where it operates a school program for children of pre-primary through the sixth-grade level as well as a summer camp program. The school receives no governmental assistance and is supported entirely by tuition payments derived from the families of its students. In the 1972-73 academic year the school's enrollment was 223 and in 1972 the camp enrollment was 236. Fairfax-Brewster advertises in the "yellow pages" of the telephone directory and distributes advertising in the area addressed to "Resident."

Bobbe's School, located in Arlington County, Virginia, operates a school program for the levels pre-primary through second grade. Like Fairfax-Brewster, Bobbe's School operates a summer camp program. The average enrollment of the school is 200 and that of the camp is 100. It receives no governmental funds or assistance and solicits students through advertisements in the classified pages of the telephone directory and by means of direct mail advertising.

Mr. and Mrs. Raymond Gonzalez first approached Fairfax-Brewster on behalf of their 5½-year-old son Colin in May 1969. They had learned of the school from its advertising and from a friend of their son who had attended the school's camp. After visiting the school with their son, Mr. and Mrs. Gonzalez decided to enroll him in the summer camp and have him continue in the first grade in the fall. They submitted a formal application and medical certificate accompanied by the requisite registration fee. On May 16, 1969 the medical certificate and registration fee were returned to Mr. and Mrs. Gonzalez accompanied by a form letter from Fairfax-Brewster stating that the school was "unable to accommodate the application." Mr. Gonzalez called the school regarding the rejection of his son's application. Captain Stuart A. Reiss, the Chairman of the Board of Fairfax-Brewster, answered the call and informed Mr. Gonzalez that "we are not integrated."

Following the rejection of Colin Gonzalez by Fairfax-Brewster, Raymond Gonzalez, in response to an advertisement in the classified directory, called Bobbe's School to inquire about enrolling his son. Mr. Gonzalez asked whether

the school was integrated and was told by a spokesman for Bobbe's School that only members of the Caucasian race were accepted. Colin Gonzalez is black.

In August 1972 and in response to an advertisement in a telephone directory, Mrs. Sandra McCrary telephoned Bobbe's School about enrolling her 2-year-old son Michael in the nursery school. After certain preliminary questions, Mrs. McCrary asked if the school was integrated and was told that it was not. Mrs. McCrary then asked if the school accepted black children and again was told that it did not. Michael McCrary is black.

The testimony of Mr. Gonzalez and Mrs. McCrary was corroborated by that of Mrs. Marjorie Bryant. In January 1972 she telephoned Fairfax-Brewster about enrolling her son, Grady. Mrs. Bryant was told that Grady could not attend the school because he was black. Mrs. Bryant called Bobbe's School and was given a similar reply.

Colin Gonzalez filed suit against Fairfax-Brewster and Bobbe's School. Michael McCrary and his parents filed suit against Bobbe's School. The actions were consolidated in the United States District Court for the Eastern District of Virginia. Plaintiffs contended that the actions of the schools denied them the same right to contract as is enjoyed by white persons and thereby violated 42 U.S.C. §1981.

Petitioner Southern Independent School Association (SISA) was permitted to intervene. In proof of its factual allegations SISA stipulated (1) that a substantial proportion of the schools represented by SISA deny admission to black applicants; (2) that SISA schools admit applicants in

the discretion of the school authorities; (3) that SISA schools are privately owned and supported entirely by tuition payments and (4) that SISA schools are generally located in areas having desegregated public education.

On this record the District Court adjudicated that the admission policies of defendant and intervenor schools constituted a violation of 42 U.S.C. §1981, enjoined defendants and intervenors from continuing to practice those policies and awarded damages to plaintiffs in varying amounts.

This decision was upheld by the United States Court of Appeals for the Fourth Circuit. The court, by Chief Judge Haynsworth, affirmed the findings of fact below, and, on the substantive legal question, held that although §1981 once served only the limited purpose of removing those legal disabilities which state statutes imposed on black people, subsequent decisions have expanded the scope of the statute to proscribe purely private acts of discrimination. *Tillman* v. *Wheaton-Haven Recreational Ass'n,* 410 U.S. 431 (1973); *Sullivan* v. *Little Hunting Park, Inc.,* 396 U.S. 229 (1969); *Jones* v. *Alfred H. Mayer Co.,* 392 U.S. 409 (1968). In particular, the court held that although *Jones* considered a cause of action arising under §1982, §1981, the statute at bar, was also derived from the Civil Rights Act of 1866, is subject to the same analysis and must be interpreted in the same light. In so holding, the court reasoned that under §1981 it is not necessary that every white applicant to defendant schools be accepted in order for any blacks to be admitted; the statute only prohibits exclusions based on race, a standard not applied to white applicants.

The court further held that the application of §1981 to defendant and intervenor schools does not violate any rights of free association or privacy. Although *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925), acknowledged the right of private schools to exist and to teach the doctrines and dogmas of their choosing, this right is not curtailed by a requirement that schools not discriminate on the basis of race. While certain school groupings may be so private, intimate and exclusive as to permit them to exclude the rest of the world, the defendant and intervenor schools do not fit into that class.

Judge Butzner concurred in the decision on the merits but dissented on the majority's reversal of the District Court's grant of attorneys' fees.

Judges Russell, Field and Widener concurred on the denial of attorneys' fees but dissented on the principal issue. The dissenting judges maintained that whereas the protections granted under §1982 involve "commercial transactions pure and simple," the issues at bar involve questions of status and the contractual nature of the relationship between student and school is only incidental. Moreover, the intimate size of the defendant and intervenor schools brings them into that realm of intimate, private and primary relationships which are beyond the reach of §1981.

Summary of Argument

In the aftermath of the Civil War this nation undertook to eliminate both the institution of slavery and the discriminatory practices incident thereto. An important vehicle for accomplishing this goal was the Civil Rights Act of 1866 which was reenacted in 1870 and has subsequently been codified, in part, at 42 U.S.C. §§1981-82.

In *Jones*, §1982 was held to prohibit racial discrimination by private persons as well as by governmental entities. In *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975), §1981 was held to prohibit racial discrimination in private employment. Both sections were passed under the same enactment, and both were intended to eradicate the same evils. The two sections differ only in that one prohibits private discrimination in connection with the transfer of property and the other prohibits discrimination in the right, *inter alia*, to make and enforce contracts.

The relationship between a student and a private school whereby one performs a service in return for consideration is clearly contractual. Although a contract in the traditional sense does not come about until after an offer is accepted, the right to make a contract is denied when one party refuses even to consider making an offer to an otherwise qualified applicant.

Nor does the application of §1981 to the defendant and intervenor schools limit their right to free association or to privacy. The right to associate, unlike the right to speak freely from which it is derived, must be balanced

against the compelling interest of the state in eliminating racial discrimination. Moreover, the essentially public character of the defendant and intervenor schools precludes them from asserting any right to privacy. In addition, the holding below is consistent with prior decisions of this Court regarding private education.

ARGUMENT

The admission practices of the defendant and intervenor schools violate 42 U.S.C. §1981.

In 1954 this Court found that "[s]eparate educational facilities are inherently unequal" and held that the Fourteenth Amendment prohibits racial discrimination by public schools. *Brown* v. *Board of Education*, 347 U.S. 483, 495 (1954). In the aftermath of the *Brown* decision segregated academies were founded for the express purpose of evading court-ordered integration.* The establishment of segregated academies was accelerated by this Court's decision in *Green* v. *County School Board*, 391 U.S. 430 (1968), which required affirmative action by school districts to implement desegregation. The growth of these academies has depleted the financial resources available for free public education in the South and has reduced the effectiveness of efforts to desegregate public education. As one commentator has noted:

> ". . . in many areas of the South efforts to eliminate segregation in public education have been nullified by the massive withdrawal of white children from the public schools and the concomitant establishment of a 'private' school system. This movement away from

* *Cf. Norwood* v. *Harrison*, 413 U.S. 455 (1973).

> public education threatens not only the achievements of fifteen years of integration efforts but also the very legitimacy of free public education in the South."

Note, *Segregation Academies and State Action*, 82 Yale L.J. 1436 (1973). The admissions practices of the academies represented herein as defendants and as members of intervenor SISA, therefore constitute the principal barrier to the effectuation of the goals set forth in *Brown*, that is, the guarantee to each American child that he will be afforded an equal educational opportunity devoid of the opprobrium of racial discrimination.

§1981 Proscribes Racial Discrimination by Private Persons in the Making and Enforcement of Contracts

§1981 was first enacted under the Thirteenth Amendment as part of Section 1 of the Civil Rights Act of 1866,* and provides, in pertinent part:

> "All persons within the jurisdiction of the United States shall have the same right in every State and

* In its original form §1 of the Civil Rights Act of 1866 included language which was subsequently codified into §1981 ("make and enforce contracts") and §1982 ("inherit, purchase, lease, sell, hold, and convey real and personal property"). §1, in pertinent part, stated:

> *"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That all persons born in the United States and not subject to any foreign power, . . . are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding."

> Territory to make and enforce contracts . . . as is enjoyed by white citizens. . . ."

The 1866 Act was enacted for the purpose of translating the "abstract truths" of the amendment into "practical freedom," Cong. Globe, 39th Cong., 1st Sess. 474, 1151 (1866), and was subsequently reenacted under the Fourteenth Amendment in 1870.

Prior to its decision in *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968), this Court had taken the position that the Thirteenth Amendment and the Civil Rights Act of 1866 enacted thereunder served to eradicate those "badges and incidents of slavery" as were imposed by state statute. *Hodges* v. *United States*, 203 U.S. 1 (1906); *Civil Rights Cases*, 109 U.S. 3 (1883). *See Corrigan* v. *Buckley*, 271 U.S. 323 (1926). In *Hurd* v. *Hodge*, 334 U.S. 24 (1948), although this Court did not directly confront the issue of purely private discrimination, it said, in *dictum*, that the 1866 Act was directed only toward "governmental action." 335 U.S. at 31.

In *Jones* this Court addressed a cause of action arising under 42 U.S.C. §1982, a statute prohibiting discrimination in the sale or lease of property which, like §1981, was derived from the Civil Rights Act of 1866. There the Court held that the 1866 Act was properly enacted under the Thirteenth Amendment and that it proscribed private acts of discrimination as well as those perpetrated by the states. In so holding the Court said:

> "It thus appears that, when the House passed the Civil Rights Act on March 13, 1866, it did so on the same assumption that had prevailed in the Senate:

> It too believed that it was approving a comprehensive statute forbidding *all* racial discrimination affecting the basic civil rights enumerated in the Act." 392 U.S. at 435. (Emphasis in original.)

Following *Jones*, this Court has on three separate occasions reaffirmed its interpretation of the Civil Rights Act of 1866 in cases involving other purely private acts of discrimination. *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969); *Tillman* v. *Wheaton-Haven Recreational Ass'n, Inc.*, 410 U.S. 431 (1973); *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975).

In *Tillman* this Court recognized that §1981 and §1982, in view of their historic interrelationship should be construed in the same way. There, in remanding a claim under §1981 to the consideration of the trial court, this Court said:

> "The operative language of both §1981 and §1982 is traceable to the Act of April 9, 1866, §1, 14 Stat. 27. Hurd v. Hodge, 334 U.S. 24, 30-31, n.7 (1948). In light of the historical interrelationship between §1981 and §1982, we see no reason to construe these sections differently, when applied, on those facts, to the claim of Wheaton-Haven that it is a private club." 410 U.S. at 439-40.

In *Johnson* v. *Railway Express Agency, Inc., supra,* this Court expressly held that §1981 was applicable to racial discrimination by private employers.

It is clear, therefore, that private acts of discrimination, as well as those acts involving governmental participation, are proscribed under §1981.

§1981 Proscribes Racial Discrimination by Private Schools

§1981, applicable in general to private acts of discrimination, is particularly applicable to acts of discrimination such as that perpetrated herein. At the outset, it is clear that the relationship between a student and a private school is essentially contractual. The student pays a fee in consideration for the school's promise to provide certain educational services. Plainly, a contract does not come about until two or more parties have reached an agreement. But the right to "make" a contract, guaranteed by §1981, is abridged when the offeror refuses to consider a *bona fide* application because of the applicant's race. Refusals to deal have been held to constitute a denial of the right to contract accorded by §1981. *Olzman* v. *Lake Hills Swim Club, Inc.*, 495 F.2d 1333, 1339 (2d Cir. 1974). Moreover, a broad reading of the contract clause of §1981 would be consistent with this Court's holding in *Sullivan*, where, in rejecting a technical reading of the term "lease," the Court said:

> "A narrow construction of the language of §1982 would be quite inconsistent with the broad and sweeping nature of the protection meant to be afforded by §1 of the Civil Rights Act of 1866, 14 Stat. 27. . ." 396 U.S. at 238.

That the refusal by defendant and intervenor schools to admit black students constitutes a denial of the applicant's right to contract is consistent with the preponderance of judicial interpretations of §1981. Indeed, this Court in *Johnson* v. *Railway Express Agency, Inc., supra,* expressly

ruled that §1981 prohibits racial discrimination in private employment:

> "Although this Court has not specifically so held, it is well settled among the federal courts of appeals* —and we now join them—that §1981 affords a federal remedy against discrimination in private employment on the basis of race."

Other cases have expanded the scope of §1981 beyond the realm of employment discrimination. *Scott* v. *Young,* 421 F.2d 143 (4th Cir.), *cert. denied,* 398 U.S. 929 (1970); *Sims* v. *Order of United Commercial Travelers of America,* 343 F. Supp. 112 (D. Mass. 1972); *Grier* v. *Specialized Skills, Inc.,* 326 F. Supp. 856 (W.D.N.C. 1971); *United States* v. *Medical Society of South Carolina,* 298 F.Supp. 143 (D.S.C. 1969). In *Scott* the court held that "§1981, the sister of §1982, must be construed in similar broad fashion" and that the refusal of a recreational facility to admit blacks when it admitted all whites who were willing to pay the requisite fee involved a denial of contractual opportunity and violated §1981. In *Grier* the court reasoned that "§1981, like §1982, should be construed to give effect to the similar remedial legislative intent which it embodies," and held that §1981 was violated by a private barber training school's refusal to admit black students.

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*"Young v. International Tel. & Tel. Co., 438 F.2d 757 (CA3 1971); Brown v. Gaston County Dyeing Machine Co., 457 F.2d 1377 (CA4), cert. denied, 409 U.S. 982, 93 S.Ct. 319, 34 L.Ed.2d 246 (1972); Caldwall v. National Brewing Co., 443 F.2d 1044 (CA5 1971), cert. denied, 405 U.S. 916, 92 S.Ct. 931, 30 L.Ed.2d 785 (1972); Long v. Ford Motor Co., 496 F.2d 500 (CA6 1974); Waters v. Wisconsin Steel Works, 427 F.2d 476 (CA7), cert. denied, 400 U.S. 911, 91 S.Ct. 137, 27 L.Ed.2d 151 (1970); Brady v. Bristol-Meyers, Inc., 459 F.2d 621 (CA8 1972); Macklin v. Spector Freight Systems, Inc., *supra.*"

There is no reason why §1981, clearly applicable to discrimination in private employment, should not encompass discrimination in private education. The school represents the most significant forum for a child's activity and expression outside the home and, necessarily, prepares him for subsequent employment. Denial of educational opportunity, whether by publicly or privately supported institutions, inevitably limits the opportunities of a child to successfully compete for gainful employment during his adult years.

The Application of §1981 to Private Schools Does Not Violate Petitioners' First Amendment Rights or Their Right of Privacy.

The freedom to associate is protected by the First Amendment. *Buckley* v. *Valeo,* 44 U.S.L.W. 4127, 4131 (U.S. Jan. 30, 1976); *Healy* v. *James,* 408 U.S. 169, 181 (1972); *NAACP* v. *Alabama,* 357 U.S. 449 (1958). But that protection is not absolute. It must give way to the extraordinary state interest in banishing racial discrimination. See *Pittsburgh Press* v. *Pittsburgh Human Relations Comm.,* 413 U.S. 376 (1973). The interest of the federal government in prohibiting racial discrimination is clear and has been expressed by Congress not only in the enactment of §1981 but, more recently, by the passage of the Civil Rights legislation of the 1960's. Civil Rights Act of 1964, Publ. L. No. 88-352, 78 Stat. 241; Civil Rights Act of 1968, Publ. L. No. 90-284, 82 Stat. 83. Nowhere has the interest of the nation in prohibiting discrimination been

more pronounced than in the field of education. *Brown* v. *Board of Education, supra; Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Green* v. *New Kent County School Board*, 391 U.S. 430 (1968); *Alexander* v. *Holmes County Bd. of Educ.*, 396 U.S. 19 (1969).

Nor does the application of §1981 to petitioners inhibit the teaching of doctrines which they espouse or the indoctrination of traditions which they deem significant. It does not even dictate to petitioners which students they must admit or the admissions standards which they must adopt. Nor can defendants and intervenors claim, as can purely political groups and parties, that private schools constitute an essential medium for the propagation of their ideology:

> "Racism and the desirability of segregation are relatively simple concepts which arguably could be communicated to children adequately at home without the necessity for a private school."

Note, *Section 1981 and Private Groups*, 84 Yale L. J. 1441, 1460 (1975).

Nor does the application of §1981 limit petitioners' right to privacy. Although that right may be invoked and in certain areas of conduct stands paramount, it protects conduct only to the extent that it is essentially private. *Roe* v. *Wade*, 410 U.S. 113, 153 (1973); *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972); *Stanley* v. *Georgia*, 394 U.S. 557 (1969); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965).

The petitioner schools can hardly claim that degree of intimacy as would remove them from the sphere of reasonable regulation. Private schools in general have long been subject to reasonable regulation. *Pierce* v. *Society of Sisters, supra; Meyer* v. *Nebraska*, 262 U.S. 390 (1923). States, for example, can impose upon private schools minimal curricular and health standards. *Farrington* v. *Tokushige*, 273 U.S. 284, 298-99 (1972); *Zucht* v. *King*, 260 U.S. 174, 176 (1922). Indeed, many states have enacted statutes expressly prohibiting racial discrimination in private schools.*

The claim of privacy by defendant and intervenor schools is particularly inappropriate. If they are "private" it is only to the extent that they receive no public funds and maintain no formal governmental ties. They accept all of those applicants who are white and meet their admissions criteria. They have student populations as large as those of many public schools. They advertise in the classified sections of telephone directories and

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* IDAHO CODE §§67-5902(10); 67-5909(6) (Burns 1973); IND. ANN. STAT. §§22-9-1-2(a), 22-9-1-3(l) (1974); MINN. STAT. ANN. §§363.01 Subd. 20, 363.03 Subd. 5 (Supp. 1974); MONT. REV. CODES ANN. §§64-305(4), 64-306(6) (Supp. 1974); N. J. STAT. ANN. §10:5-5(1) (Supp. 1974); S. DAK. COMPILED LAWS ANN. §§20-13-1(11), 20-13-22 (Supp. 1974); V. I. CODE ANN. tit. 10, §2 (1966). See also MASS. ANN. LAWS ch. 151C, §1(b) (Supp. 1974) (schools accepting admissions from the general public which are not "distinctly private"); N. Y. EXEC. LAW §296-4 (McKinney Supp. 1974) (school which holds itself out to the public); WASH. REV. CODE ANN. §9.91.010 (1961) (schools of special instruction nursery schools). *See generally*, Note, *Section 1981 and Private Groups, supra* at 1460-61.

through mailings addressed to "Resident." In many areas the intervenor schools have virtually supplanted the local public school systems and constitute the principal medium for the education of white children. See Note, *Segregated Academies and State Action, supra* at 1453.

Indeed, the avowed purpose of defendant and intervenor schools belies their claim of privacy. The schools were not set up as intimate groups for the propagation of certain concepts and ideas. They were founded to avoid the effects of court-ordered desegregation decrees. They had no purpose but to create a parallel school system open to every white child and closed to each black child. Thus, the Court is not confronted with a legitimate claim of privacy by an ethnic, fraternal or literary group. Rather, these schools represent the most recent of a series of attempts to avoid compliance with a fundamental national policy.*

The Decision Below Is Consistent With Prior Decisions of This Court Regarding Private Education

Although this Court has upheld the right of children to attend private schools and has recognized the importance of such schools in a comprehensive system of national education, nothing in those decisions permits or condones racial discrimination by private schools.

In *Pierce* v. *Society of Sisters, supra,* this Court recognized the right of parents to send their children to pri-

* See Note, *Segregation Academies and State Action,* 82 Yale L.J. 1436, 1440 (1973).

vate, rather than public schools. Nevertheless, the Court noted that

> "No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them . . . ." 268 U.S. at 534.

The national policy against discrimination in private education was expressed in *Green* v. *Connally,* 330 F. Supp. 1150, 1163 (D.D.C. 1971), *aff'd sub nom., Coit* v. *Green,* 404 U.S. 997 (1971). There, in determining that contributions to private schools which discriminate against Blacks in admissions are not tax-deductible the three-judge court noted:

> "The Code must be construed and applied in consonance with the Federal public policy against support for racial segregation of schools, public or private.*

Norwood v. *Harrison, supra* at 457, did not reach the issue of the "right of citizens to maintain private schools with admission limited to students of particular national

* The court in *Green* was careful to distinguish between private schools which discriminate on the basis of race and *bona fide* sectarian schools:

> "The special constitutional provisions ensuring freedom of religion also ensure freedom of religious schools, with policies restricted in furtherance of religious purpose. Section 503 of the Model Anti-Discrimination Act . . . permits religious educational institutions 'to limit admission or give preference to applicants of the same religion.'" 330 F.Supp. at 1169.

The same distinction is recognized in recently issued Internal Revenue Service guidelines:

> "A school that selects students on the basis of membership in a religious denomination or unit thereof will not be deemed to have a discriminatory policy if membership in the denomination or unit is open to all on a racially nondiscriminatory basis," Federal Register, Vol. 40, No. 223, p. 53410, Sec. 3.03, November 18, 1975.

origins, race, or religion or the authority of the state to allow such schools." Although in *Norwood* the Court said that "[ ]uch private bias is not barred by the Constitution . . . ," this *dictum* is not unequivocal. On the very next page the Court notes:

> ". . . even some private discrimination is subject to special remedial legislation in certain circumstances under §2 of the Thirteenth Amendment; Congress has made such discrimination unlawful in other significant contexts."

Moreover, the Court continues,

> "[i]nvidious private discrimination . . . has never been accorded affirmative constitutional protections." 413 U.S. at 470.

Conclusion

For the foregoing reasons, the *Amici* respectfully submit that this Court should affirm the decision below holding that the discriminatory practices of defendants and intervenors herein are prohibited under §1981.

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